UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SHANNON CAMPBELL,

Plaintiff,

v.

FELD ENTERTAINMENT, INC., et al.,

Defendants.

MARK ENNIS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC., et al.,

Defendants.

Case Nos.: 12-CV-04233-LHK
13-CV-00233-LHK

ORDER GRANTING MOTION TO DISMISS AND STRIKE

Defendants Feld Entertainment, Inc., Mike Stuart, and David Bailey (collectively, "Defendants") move to dismiss Plaintiffs Shannon Campbell's ("Campbell") and Mark Ennis's ("Ennis") (collectively, "Plaintiffs") third cause of action, which alleges a violation of Article I, Section 2 of the California Constitution, in the Third Amended Consolidated Complaint ("TACC") pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) for lack of standing and 12(b)(6) for

failure to state a claim. Campbell ECF No. 126 ("Motion").[1] Defendants also move to strike previously dismissed Defendants from the TACC pursuant to Rule 12(f). *Id.* The Court held a hearing on this motion on March 20, 2014. ECF No. 153. Having considered the parties' arguments, the relevant law, and the record in this case, the Court hereby GRANTS Defendants' Motion.

I. BACKGROUND

A. Factual Allegations[2]

Plaintiffs are animal rights advocates and are members of Humanity Through Education ("HTE"), a San Francisco Bay Area animal rights activism group dedicated to the humane treatment of animals and educating the public about the abuse and mistreatment of animals in circuses. Campbell ECF No. 124 (TACC), ¶¶ 5, 6, and 17. Plaintiffs hold signs and banners and offer informational leaflets to the public about the condition and treatment of animals kept by circuses. TACC ¶ 17. Defendant Feld Entertainment, Inc. owns, produces, and is doing business as Ringling Bros. and Barnum & Bailey Circus ("Circus"). TACC ¶ 7.

Plaintiffs videotape the treatment of the animals with the purpose of educating the public about the treatment of animals by circuses. TACC ¶ 17. Campbell has been leafleting patrons of circuses for six years and videotaping the circuses' treatment of animals for five years. TACC ¶ 21. Ennis has been leafleting patrons of circuses and videotaping the circuses' treatment of animals for approximately fourteen years. TACC ¶ 22. Along with other HTE members, Plaintiffs have videotaped the treatment of animals by Circus in numerous California cities. TACC ¶ 23.

Circus performs annually in the San Francisco Bay Area every August and September. TACC ¶ 25. Two or three days before the first performance, Circus employees bring the animals via railroad to the city in which they are performing and then unload the animals from the train and walk the animals down the public streets to the arenas where they perform (the "animal walk"). TACC

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[1] Docket entries in *Campbell v. Feld Entertainment, Inc. et al.*, Case No. 5:12-CV-04233-LHK will be cited as "Campbell ECF". Docket entries in *Ennis v. Feld Entertainment, Inc. et al.*, Case No. 5:13-CV-00233-LHK, will be cited as "Ennis ECF".

[2] The Court draws the following facts from Plaintiffs' Third Amended Consolidated Complaint, ECF No. 124 ("TACC"), which the Court accepts as true for the purposes of ruling on Defendants' Motion to Dismiss. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

¶ 26. After the last scheduled performance at the arena, Circus employees walk the animals back to the train. *Id*. In between performances, the animals are kept in a compound that often is set up in the parking lot of the arena in which the circus is appearing. TACC ¶ 27. Plaintiffs and other members of HTE offer informational leaflets to patrons of every Circus performance in the Bay Area. TACC ¶ 28. Plaintiffs and other members of HTE also videotape the treatment and living conditions of animals used by Circus before, during, and after the performances. TACC ¶ 28.

Plaintiffs allege that Circus has a "policy and practice . . . to intentionally interfere with Plaintiffs' free speech rights for the purpose of chilling [P]laintiffs in the exercise of their constitutionally protected rights." TACC ¶ 31. Plaintiffs claim that Defendants were motivated by Plaintiffs' political beliefs and the intent to prevent Plaintiffs from exercising their speech rights. TACC ¶¶ 86, 87.

Plaintiffs assert that for the past several years, Circus employees have harassed Plaintiffs and interfered with Plaintiffs' ability to videotape the animals. TACC ¶ 29. Circus's employees engage in physical assaults and attempts to block Plaintiffs' cameras while Plaintiffs attempt to videotape the animals. TACC ¶ 30. Circus's employees' conduct takes three general forms: (1) shining laser pointers and strobe lights into Campbell's eyes and camera lens; (2) physical and verbal assaults on Plaintiffs while Plaintiffs are videotaping; and (3) using a rope during the animal walks to harass Plaintiffs and interfere with Plaintiffs' videotaping. TACC ¶¶ 32, 33, 34.

Plaintiffs allege that "Defendants' interference and attempted interference through threats, harassment, intimidation, and coercion of Plaintiffs while videotaping [Circus's] treatment of the animals in a public forum, deprived Plaintiffs of the clearly established and well-settled Constitutional right protected by Article I, Section 2(a) of the California Constitution, and Defendants are therefore liable to Plaintiffs for the violation of said right." TACC ¶ 109. Plaintiffs further allege:

> Defendants stepped into the role of the state when they worked jointly and conspired with police to exceed rules established by local municipalities regarding permit requirements, and by taking over and blocking the public's and Plaintiffs' ingress and egress from multiple public streets, sidewalks and other public fora. Defendants did not seek to exclude the public from these traditional public fora; indeed they invited the public to observe the animal walks – but only under

> conditions set by Defendants. By exercising dominion and control over public streets and sidewalks - which are traditional public fora – and inviting the public to observe, Defendants became state actors. Defendants exercised or attempted to exercise complete control over public thoroughfares in which plaintiffs sought to exercise their free speech rights, and thereby assumed liability for their efforts to suppress Plaintiff[s'] constitutionally protected rights.

TACC ¶ 110. As a "direct and proximate result of Defendants' violation of California Liberty of Speech and Press Clause, Article 1, Section 2(a), California Constitution, Plaintiff[s] sustained injuries and damages[.]" TACC ¶ 111.

B. Procedural History

On August 10, 2012, Campbell filed her original Complaint asserting four causes of action, including violation of Article 1, Section 2 of the California Constitution. Campbell ECF No. 1. On December 20, 2012, Campbell filed her First Amended Complaint ("FAC") prior to any defendant filing a response to Campbell's original Complaint. Campbell ECF No. 11. Campbell's FAC also asserted a cause of action for violation of Article 1, Section 2 of the California Constitution. *See id*. On January 16, 2013, Defendant Feld Entertainment, Inc. ("Feld") moved to dismiss Plaintiff's FAC. Campbell ECF No. 26. Feld's motion argued that Plaintiffs' Article I, Section 2 claim should be dismissed for failure to state a claim. *Id*. Campbell filed an opposition. Campbell ECF No. 42. Feld filed a reply. Campbell ECF No. 47. Feld's motion to dismiss was subsequently mooted by Plaintiffs' Second Amended Consolidated Complaint ("SAC"). Campbell ECF Nos. 70 and 71.

On January 17, 2013, Ennis filed his original Complaint asserting six causes of action, including a cause of action for violation of Article 1, Section 2 of the California Constitution. Ennis ECF No. 1. On April 16, 2013, Ennis filed his First Amended Complaint. Ennis ECF No. 8. Ennis's FAC asserted the same six causes of action in his original Complaint, including a cause of action for violation of Article 1, Section 2 of the California Constitution. *See id*. On May 22, 2013, Defendants moved to dismiss Ennis's FAC. Ennis ECF No. 13. Defendants argued that, among others, Plaintiffs' cause of action for violation of California Constitution's Article I, Section 2 fails as a matter of law because Plaintiffs may not seek monetary damages for Defendants' purported violation of the rights afforded by the California Constitution, Article I, Section 2. Ennis filed an

opposition. Ennis ECF No. 16. Defendants filed a reply. Ennis ECF No. 17. Defendants' motion to dismiss was subsequently mooted by Plaintiffs' SACC. ECF Nos. 21 and 22.

On July 9, 2013, Plaintiffs filed the SACC. Campbell ECF No. 73. As in Plaintiffs' earlier complaints, Plaintiffs' SACC includes a cause of action for a violation of Article 1, Section 2 of the California Constitution. On August 12, 2013, Defendants moved to dismiss and/or strike the SACC. Campbell ECF No. 94. In particular, Defendants argued that Plaintiffs' claim for violation of Article 1, Section 2 of the California Constitution fails as a matter of law because: (1) Plaintiffs fail to allege state action; and (2) Article I, Section 2 does not give rise to a private right of action for money damages. *See id*. On August 30, 2013, Plaintiffs filed an opposition to Defendants' motion. Campbell ECF No. 107. On September 6, 2013, Defendants filed their reply. Campbell ECF No. 109.

On October 4, 2013, the Court granted in part and denied in part Defendants' Motion to Dismiss and/or Strike Plaintiffs' SACC. Campbell ECF No. 120 ("First MTD Order"). With respect to Article I, Section 2, the Court concluded that:

> Article I, Section 2 includes a state actor limitation such that Article I, Section 2 protects only against the interference by state actors of citizens' exercise of speech rights in a public forum. In certain limited situations in which a private actor opens his land to the public such that the land becomes a public forum, a private actor may satisfy the state actor limitation. Absent this limited exception, California law does not support holding a private actor liable under Article I, Section 2 for interference with another private actor's exercise of speech rights in a public forum.

First MTD Order at 13. The Court determined that Plaintiffs' factual allegations did not satisfy the state actor limitation and thus dismissed Plaintiffs' Article I, Section 2 claim. First MTD Order at 15. The Court, however, recognized that Plaintiffs "may cure the deficiency." *Id*. Thus, "in an abundance of caution," the Court granted Plaintiffs leave to amend. *Id*.

On October 17, 2013, Plaintiffs filed a Motion for Leave to Amend their SACC to substitute their negligent supervision claim with a negligence claim. Campbell ECF No. 121. The Court denied the Motion for Leave to Amend on February 14, 2014, because the Court found undue delay by Plaintiffs and prejudice to Defendants. Campbell ECF No. 142.

On October 21, 2013, Plaintiffs filed a Third Amended Consolidated Complaint ("TACC"). Campbell ECF No. 124. As in the previous complaints, Plaintiffs asserted an Article I, Section 2 claim in their TACC. *See* TACC. On November 4, 2013, Defendants moved to dismiss and/or strike Plaintiffs' TACC. Campbell ECF No. 128. On November 18, 2013, Plaintiffs opposed. Campbell ECF No. 128. Defendants replied on November 25, 2013. Campbell ECF No. 129.

II. LEGAL STANDARDS

A. Rule 12(b)(1)

A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). A motion to dismiss for lack of subject matter jurisdiction will be granted if the complaint on its face fails to allege facts sufficient to establish subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). In considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). At the motion to dismiss stage, the plaintiff bears the burden of establishing the court's jurisdiction through allegations of "specific facts plausibly explaining" why the standing requirements are met. *Barnum Timber Co. v. U.S. Envtl. Prot. Agency*, 633 F.3d 894, 899 (9th Cir. 2011). If the plaintiff lacks standing under Article III of the U.S. Constitution, then the court lacks subject matter jurisdiction, and the case must be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

B. Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, a court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

However, a court need not accept as true allegations contradicted by judicially noticeable facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the "[C]ourt may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor is the court required to "'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678. Furthermore, "a plaintiff may plead herself out of court" if she "plead[s] facts which establish that [s]he cannot prevail on h[er] . . . claim." *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (internal quotation marks omitted).

C. Rule 12(f)

Federal Rule of Civil Procedure 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See* Fed. R. Civ. P. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983). Motions to strike are generally disfavored and "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation . . . If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court should deny the motion." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (internal citations omitted).

"With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." *Id.* "Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court." *Cruz v. Bank of New York Mellon*, No. 12–00846, 2012 WL 2838957, at *2 (N.D. Cal. July 10, 2012) (citing *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)).

D. Leave to Amend

If the Court determines that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "should be freely granted when justice so requires," bearing in mind that "the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks omitted). Nonetheless, a court "may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . , [and] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

III. DISCUSSION

In Defendants' Motion, Defendants seek to dismiss only Plaintiffs' third cause of action in the TACC, which alleges a violation of Article I, Section 2 of the California Constitution, pursuant to Rules 12(b)(1)[3] and (6). *See* Mot. at 4-12. In the alternative, Defendants move to strike previously dismissed defendants from the TACC pursuant to Rule 12(f). Mot. at 12-13. The Court discusses each in turn.

A. Motion to Dismiss

[3] Defendants appear to cite to Rule 12(b)(1) as a basis for dismissal by stating in the Legal Standard section that, "[a] motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is proper where a plaintiff lacks the requisite Article III standing to pursue the relief requested." Mot. at 4. However, Defendants do not explain how Plaintiffs lack the requisite Article III standing anywhere in the Motion.

Defendants argue that Plaintiffs' Article I, Section 2 claim fails as a matter of law because: (1) the Court has already determined that Article I, Section 2 only protects against state action, Mot. at 5-6; (2) Plaintiffs fail to allege state action under California law and federal law, Mot. at 6-10; and (3) Article I, Section 2 does not give rise to a private right of action for money damages, Mot. at 10-12. In response, Plaintiffs contend that the Court should not dismiss Plaintiffs' Article I, Section 2 claim because: (1) Defendant Feld is a state actor under California law, Opp'n at 1-3; (2) federal law supports finding that Defendant Feld was a state actor, Opp'n at 3-4; and (3) a constitutional tort is appropriate in this case because Defendant Feld is "using its power and authority to interfere with Plaintiff[s'] constitutional rights," Opp'n at 5-6. For the reasons stated below, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' Article I, Section 2 claim.

1. Allegations of State Action in the TACC

The Court previously held that "Article I, Section 2 includes a state actor limitation such that Article I, Section 2 protects only against the interference by state actors of citizens' exercise of speech rights in a public forum." First MTD Order at 13. "In certain limited situations in which a private actor opens his land to the public such that the land becomes a public forum, a private actor may satisfy the state actor limitation." *Id.*

Specifically, regarding state action, Defendants contend that Plaintiffs' allegations in the TACC: (1) are "mere labels and conclusions, and a formulaic recitation of the elements of a cause of action," and are therefore "insufficient to sustain a cause of action" under *Twombly* and *Iqbal*; (2) do not meet the standard for proving state action required under California law; and (3) fail to properly allege state action under any recognized federal doctrine. Mot. at 6. For the reasons stated below, the Court agrees with Defendants. Plaintiffs' TACC fails to sufficiently allege that Defendants are state actors under Article I, Section 2.

First, Plaintiffs' new allegations in the TACC do not meet the level of specificity required by *Twombly* and *Iqbal*. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause

of action will not do . . ." *Twombly*, 550 U.S. at 555. Further, a complaint does not "suffice if it tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 677.

Here, Plaintiffs' allegations with respect to state action are nothing more than "labels and conclusions," and "naked assertions devoid of further factual enhancement." With respect to state action, Plaintiffs allege that "Defendants stepped into the role of the state when they worked jointly and conspired with police to exceed rules established by local municipalities regarding permit requirements, and by taking over and blocking the public's and Plaintiffs' ingress and egress from multiple public streets, sidewalks and other public fora." TACC ¶ 110. Plaintiffs further allege that, "[b]y exercising dominion and control over public streets and sidewalks - which are traditional public fora – and inviting the public to observe, Defendants became state actors." *Id*.

Based on the above allegations, Plaintiffs appear to allege that Defendants formed a conspiracy with local police to control the public streets and sidewalks. Thus, Defendants are state actors. However, Plaintiffs do not allege facts that would make the existence of a conspiracy between Defendants and the local police plausible. Plaintiffs also do not allege additional facts to show how Defendants exercised dominion and control over the streets and sidewalks. Indeed, Plaintiffs' allegations are merely consistent with any permit, where an organization pays a fee and obtains permission to use a public space for a particular event. Plaintiffs do not show how or why the conspiracy was formed and what acts Defendants and police officers in various cities committed in furtherance of the conspiracy. Notably, Plaintiffs' Opposition fails to address the lack of specificity of Plaintiffs' allegations. *See generally* Opp'n. Thus, such allegations by Plaintiffs in the TACC do not meet the level of specificity required by *Twombly* and *Iqbal*.

Second, under California law, Plaintiffs' new allegations in the TACC are insufficient to establish state action under Article I, Section 2. Plaintiffs' TACC essentially alleges that Defendants are state actors because Defendants assumed control over public streets and sidewalks, which are "traditional public fora," and conspired with local police. Plaintiffs argue that, "a private party who assumes control over property that already was a public forum (i.e., a street or sidewalk), is also a state actor under California law." Opp'n at 3. However, Plaintiffs do not cite to any authority in their Opposition to support their argument that control of public streets and sidewalks by a private

party in connection with an event, with a permit, such as an animal walk is sufficient to deem that private party a state actor under Article I, Section 2. Indeed, at the March 20, 2014 hearing, Plaintiffs conceded that they cannot cite to any authority. Tr. at 4:24-5:11 ("Court: What can I look to as authority that control of public property by a private entity and some type of conspiracy with a state actor, such as the police, that that would convert that private actor into a state actor? [Plaintiffs' counsel]: I can't cite you to a specific case."). Plaintiffs also cannot cite to any case that holds that private parties parading on public streets are state actors. *See* Tr. 11:5-17.

Plaintiffs nonetheless argue in their Opposition that the TACC "plead[s] facts establishing state action as articulated in the lead plurality opinion in *Golden Gateway v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013 (2001)." Opp'n at 1. However, Plaintiffs' Opposition does not elaborate on how *Golden Gateway* supports a finding of state action in the instant case. Plaintiffs' Opposition instead seizes on the following sentence of the Court's First MTD Order: "Plaintiffs do not allege that Defendants own or have control of any of the property on which Plaintiffs exercised Plaintiffs' speech rights." *See* Opp'n at 2 (quoting First MTD Order at 13). Plaintiffs thus argue that "control of property" was an element that the Court "signaled" that Plaintiffs could address in establishing state action.[4] Opp'n at 2. However, the Court's First MTD Order specifically held that:

> In certain limited situations in which a private actor opens his land to the public such that the land becomes a public forum, a private actor may satisfy the state actor limitation. Absent this limited exception, California law does not support holding a private actor liable under Article I, Section 2 for interference with another private actor's exercise of speech rights in a public forum.

First MTD Order at 13. The Court also held that "[i]n cases where a private property owner opens his property to the public such that the property becomes a public forum, the private property owner essentially steps into the shoes of the state and in so doing is subject to the same restrictions as the state." *Id*. at 14. Thus, the Court's First MTD Order does not support Plaintiffs' "control" theory. Moreover, as set forth above, Plaintiffs cannot point to any case, and the Court has not found any, where a private party's control of public property converted that private party into a state actor under Article I, Section 2. Furthermore, the plurality opinion in *Golden Gateway* only held that "the

[4] To avoid any further confusion, the Court issued an amended First MTD Order eliminating the reference to control of property. Campbell ECF No. 154, Ennis ECF No. 66.

actions of a private property owner constitute state action for purposes of [Article I, Section 2] only if the property is freely and openly accessible to the public." 26 Cal.4th at 1033. Nowhere in the plurality opinion of *Golden Gateway* did the California Supreme Court hold, or even suggest, that a private party can be a state actor when it "controls" public property in connection with a permit. Therefore, Plaintiffs' TACC does not plead facts establishing state action as articulated in the plurality opinion in *Golden Gateway*.

Plaintiffs contend that, although they cannot point to a specific case to support their assertion, California Supreme Court cases support Plaintiffs' position that Defendants are state actors. Tr. at 5:11-15. However, the Court previously found in the First MTD Order that the relevant California Supreme Court case law "all dealt with restrictions private property owners placed on people exercising speech rights on the private property." First MTD Order at 12. The Court also noted that "[n]othing in those decisions suggests a broader application of Article I, Section 2 to other private actors." *Id*. Moreover, the Court's First MTD Order did not find any cases "in which the California Supreme Court has explicitly extended the protection of Article I, Section 2 to interference by private individuals outside of the context of a private actor's ownership of property that has been opened to the public such that the private property in essence becomes a public forum." *Id*. Thus, contrary to Plaintiffs' assertion, California Supreme Court cases do not support Plaintiffs' position that Defendants are state actors.

Finally, at the March 20, 2014 hearing, the parties stated that the federal tests for determining whether a private individual's actions amount to state action under the U.S. Constitution—public function test,[5] joint action test, state compulsion test, and governmental-nexus test—need not be

[5] At the hearing, Plaintiffs appear to argue that Defendants' actions meet the public function test. Plaintiffs cite to two cases to support their argument: (1) *Marsh v. Alabama*, 326 U.S. 501 (1946), and (2) *Watch Tower Bible & Tract Society of New York, Inc. v. de Jesus, et al.*, 634 F.3d 3 (1st Cir. 2011). Tr. at 14-16 (stating that *Marsh* is "the leading case establishing that control and management of public streets are unlike festivals and exclusive government function" and *Watch Tower* is a case "in which the court found that the regulation of access to and controlling behavior on public streets is a classic government public function."). However, Plaintiffs argue that the federal tests do not apply in the instant case. Tr. at 17:11-25. The Court agrees that it is not required to apply the federal tests under Article I, Section 2. Accordingly, the Court need not address Plaintiffs' argument that Defendants' actions meet the public function test.

applied to the Article I, Section 2 claim. Plaintiffs stated that the federal tests do not apply because "the federal tests were for the purpose of determining whether or not there's a First Amendment or other federal constitutional violation, and therefore whether there are state actions." Tr. at 17:11-25. Defendants also state that they have not seen a case where the federal tests were applied to an Article I, Section 2 claim. Tr. at 26:1-7. Indeed, the Court has not found any case that applied any of the federal tests in determining whether a private party can be found a state actor under Article I, Section 2. Accordingly, the Court need not address the federal tests in determining whether Defendants' actions constituted state action under Article I, Section 2.[6]

Based on the above, Defendants are not state actors under Article I, Section 2 of the California Constitution.[7] Accordingly, the Court dismisses Plaintiffs' Article I, Section 2 claim.

B. Leave to Amend

The Court dismisses Plaintiffs' Article I, Section 2 claim without leave to amend because amendment would be futile for the reasons stated below. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (a district court may deny leave to amend due to "repeated failure to cure deficiencies by amendments previously allowed" and "futility of amendment"); *Swartz v.*

[6] Defendants cite to *Villegas v. Gilroy Garlic Festival Association*, 541 F.3d 950 (9th Circuit 2008), as persuasive authority that "[o]btaining a permit to do something on a public property does not automatically turn the permit holder into a state actor." Reply at 3. In *Villegas*, the Ninth Circuit decided the issue of whether guests at the Gilroy Garlic Festival ("Festival") can hold the City of Gilroy in California and the Gilroy Garlic Festival Association ("GGFA") liable under 42 U.S.C. § 1983. 541 F.3d at 952. GGFA is a private non-profit corporation that sponsors and runs the Festival. *Id*. at 953. GGFA had an informal dress code that required persons wearing clothing with gang colors or insignia to remove such clothing in order to remain at the Festival. *Id*. at 953-54. After a police officer enforced the dress code, the plaintiffs sued GGFA under Section 1983. *Id*. In applying the public function test, the Ninth Circuit concluded that the GGFA is not a state actor for purposes of Section 1983 liability. *Id*. at 956. First, the Ninth Circuit reasoned that running festivals is not a traditional municipal function. *Id*. Second, the City of Gilroy required a permit, showing that the City retained control of the park and provided security services. *Id*. Finally, there is no indication in the record that the City plays a dominant role in controlling the actions of the organization or the content of the festival. *Id*. The Court notes that *Villegas* addressed state action under Section 1983 and applied the public function test, a federal test, in determining whether GGFA, a private party, is a state actor. Because the instant case involves Article I, Section 2 (not 42 U.S.C. § 1983) and the Court is not required to apply the federal tests to an Article I, Section 2 claim, *Villegas* is distinguishable.

[7] Because Plaintiffs have failed to state a claim under Article I, Section 2, the Court need not reach the issue of whether Plaintiffs may assert a tort cause of action under Article I, Section 2.

KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007) (futility alone can justify the denial of leave to amend).

Thus far, Plaintiffs have filed *six* complaints. In addition, Plaintiffs have been on notice of the state action deficiency of their Article I, Section 2 claim from Defendants' August 12, 2013 motion to dismiss and the Court's October 4, 2013 First MTD Order.[8] The Court concludes that if Plaintiffs had a legitimate basis to set forth a plausible Article I, Section 2 claim, Plaintiffs would already have articulated it in a meaningful way in one of their many complaints. This is especially true given that the Court's First MTD Order set forth precisely what deficiencies Plaintiffs needed to address with respect to their Article I, Section 2 claim. Particularly, the Court determined that Plaintiffs' FAC failed to state an Article I, Section 2 claim because Article I, Section 2 includes a state actor limitation, and Plaintiffs failed to allege that Defendants were state actors. First MTD Order at 13. Accordingly, the Court finds that amendment is futile and will not give Plaintiffs a seventh bite at the apple. *Carvalho*, 629 F.3d at 892; *Ruiz v. Natl. City Bank*, 2:09CV01586JAMGGH, 2010 WL 1006412, at *5 (E.D. Cal. 2010) ("[D]ismissal with prejudice is appropriate given that the Plaintiff has been given two chances to try to plead proper claims against this Defendant."). Given that this Court's discretion to deny leave to amend is particularly broad where a complaint has already been amended, *see Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011), the Court dismisses Plaintiffs' Article I, Section 2 claim with prejudice.

C. Motion to Strike

Defendants argue that allegations in the TACC relating to the dismissed defendants, Michael Gillett and James Dennis, must be stricken. Mot. at 12. As part of the parties' meet and confer session regarding potential amendments to the SACC, Plaintiffs agreed to dismiss Defendants Gillett and Dennis from the TACC. *See* ECF No. 115. The Court subsequently dismissed Gillett and Dennis as defendants. First MTD Order at 26. However, the TACC still identifies Gillett and

[8] Defendants filed motions to dismiss Plaintiffs' Article I, Section 2 claim on January 16, 2013, and May 22, 2013, on the basis that Article I, Section 2 does not create a private right of action for damages.

Dennis as defendants. TACC ¶¶ 8-9. The TACC also alleges that Gillett and Dennis "joined in the common Circus employees' behavior of shining laser pointers into the cameras of activists," TACC ¶ 48, and supervised the Circus employees who were throwing objects at Ennis, TACC ¶ 50. Plaintiffs do not oppose Defendants' Motion to Strike and state that, "Defendants correctly point out several Scrivener's errors in the [TACC] which refer to Gillett and Dennis as defendants." Accordingly, the Court strikes all allegations in the TACC that refer to Gillett and Dennis (TACC ¶¶ 8, 9, 48, 50).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' Article I, Section 2 claim with prejudice and GRANTS Defendants' Motion to Strike all allegations in the TACC that refer to Matthew Gillett and James Dennis. Plaintiffs shall file an amended consolidated complaint within seven days of this Order to modify Paragraphs 8, 9, 48, and 50 by removing all references to Gillett and Dennis. Plaintiffs may not make any other changes to the TACC.

IT IS SO ORDERED.

Dated: April 7, 2014

Lucy H. Koh

LUCY H. KOH
United States District Judge